AEDY OSMAN A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
WAN ADNAN MUHAMAD JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: J-05-175-2008]
10 SEPTEMBER 2009 C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Whether mens rea possession established - Whether presumption of possession invoked - Whether 'Radhi' direction properly applied - Dangerous Drugs Act 1952, s. 37(d)* D

CRIMINAL PROCEDURE: *Appeal - Fact, finding of - Approach of appellate court to trial court's findings of fact*

The appellant was arrested by a police raiding party acting on information received that a drug trafficking transaction was about to E take place. The appellant was overpowered after a short struggle, with a red bag slung over his right shoulder. From the red bag, the police party recovered a work pass belonging to the appellant and packages containing a dried substance later confirmed to be ganja, to wit a dangerous drug. The appellant was tried in the High Court F on a charge of drug trafficking under s. 39B of the Dangerous Drugs Act 1952, convicted and sentenced to death. He appealed to the Court of Appeal. On appeal, the appellant raised *inter alia* the following issues: (i) the trial judge had erred in finding there was actual *(mens rea)* possession; (ii) the trial judge erred in inferring G knowledge of the dangerous drugs on the appellant's part; (iii) the trial judge had failed to consider that no proper investigations were carried out to find a person named 'Kassim' – the alleged trafficker in the instant case.

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Held (dismissing the appeal)
Per Azhar Ma'ah JCA delivering the judgment of the court:

(1) In the instant case, the trial judge had made a specific finding of actual possession of the drugs by the appellant. He did not I invoke s. 37(d) of the Act to find possession. It was clear that the trial judge's finding of *mens rea* possession was based on the factual matrix of the case as revealed by the prosecution's

evidence. The trial judge then proceeded to draw a presumption of trafficking under s. 37(da) of the Act, before calling upon the appellant to enter his defence. There was no flaw in his approach. (paras 7, 11 & 18)

(2) With regard to the character named 'Kassim' – the trial judge had applied the *Radhi* direction and properly concluded that 'Kassim' was a fictitious person. The trial judge had given reasons for such a conclusion. *Mohamad Radhi v. PP* (foll). (paras 14 & 15)

(3) As an appellate court, the Court of Appeal would not interfere with the findings of facts arrived at by the trial court, to which the law entrusted the primary task of evaluation of the evidence. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ditangkap dalam satu serbuan sepasukan anggota polis yang bertindak atas maklumat bahawa suatu transaksi pengedaran dadah akan berlaku di suatu tempat. Perayu dapat diberkas selepas satu pergelutan, dalam keadaan satu beg galas merah tergalas di bahu kanannya. Dari beg merah tersebut pihak polis menjumpai satu pas kerja milik perayu dan beberapa bungkusan yang mengandungi daun-daun kering yang kemudian disahkan sebagai ganja, iaitu dadah berbahaya. Perayu dibicarakan di Mahkamah Tinggi atas pertuduhan mengedar dadah di bawah s. 39B Akta Dadah Berbahaya 1952, dan disabit serta dihukum mati. Di rayuan, perayu antara lain membangkitkan isu-isu berikut: (i) hakim bicara khilaf dalam mendapati wujudnya milikan sebenar (*mens rea*); (ii) hakim bicara khilaf dalam mengandaikan pengetahuan mengenai dadah berbahaya di pihak perayu; (iii) hakim bicara gagal menimbang bahawa tiada usaha-usaha wajar dibuat bagi mencari seorang yang bernama 'Kassim' – yang dikatakan pengedar dalam kes semasa.

Diputuskan (menolak rayuan)
Oleh Azhar Ma'ah HMR menyampaikan penghakiman mahkamah:

(1) Dalam kes semasa, hakim bicara telah membuat dapatan spesifik milikan sebenar dadah oleh perayu. Beliau tidak menggunakan s. 37(d) Akta bagi mendapati wujudnya milikan. Adalah jelas bahawa dapatan milikan *mens rea* oleh hakim bicara adalah berdasarkan keadaan fakta kes seperti yang terdedah dari keterangan pendakwaan. Kemudian dari itu barulah hakim

bicara membangkitkan anggapan pengedaran di bawah s. 37(da) Akta, sebelum memanggil perayu untuk membela diri. Pendekatan yang diambil ini tiada cacat celanya.

(2) Berkaitan orang yang bernama 'Kassim' – hakim bicara telah menggunapakai arahan *Radhi* dan merumuskan dengan wajarnya bahawa 'Kassim' adalah seorang yang tidak wujud. Hakim bicara telah pun memberikan sebab-sebab atas konklusinya itu. *Mohamad Radhi v. PP* (diikuti).

(3) Sebagai sebuah mahkamah peringkat rayuan, Mahkamah Rayuan tidak akan campur tangan dalam dapatan-dapatan fakta yang dibuat oleh mahkamah bicara, memandangkan, di sisi undang-undang, tanggungjawab utama untuk menilai keterangan-keterangan adalah terletak atas mahkamah tersebut.

Case(s) referred to:
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(foll)***
PP v. Muhamed Ali [1962] 1 LNS 129 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 39B

For the appellant - Gobind Singh Deo; M/s Gobind Singh Deo & Co
For the respondent - Siti Rafidah Zainuddin DPP

[Appeal from High Court, Johor Bahru; Criminal Proceeding No: MT(3) 45-03-2007]

Reported by Andrew Christopher Simon

JUDGMENT

Azhar Ma'ah JCA:

[1] In this appeal, the appellant was charged and convicted under s. 39B of the Dangerous Drugs Act 1952 by the High Court, Johor Bahru. He was then sentenced to death. Being dissatisfied with that decision, the appellant now appeals.

[2] The facts as found by the learned trial judge were, at about 12.30pm on 10 March 2006 while at his office ASP Abdullah bin Mohammad (SP4) received an information that a drug trafficking

A transaction would take place in the vicinity of Kedai Serbaneka "One Mart 24 Jam", Jalan Padi Emas 4/1, Bandar Baru Uda, Johor Bahru. The suspect was a male Malay. With that information SP4 immediately swung into action. By 3.30pm SP4 and five of his men proceeded to the scene. Upon arrival they positioned themselves at
B various locations. Soon they noticed a male Malay walking towards Kedai Serbaneka "One Mart 24 Jam" seen slinging a red bag on his right shoulder walking in a suspicious manner. SP4 and one of the five members of the raiding party approached the said male Malay, identified themselves as police and immediately apprehended him. A
C struggle ensued as the man tried to free himself and make an escape. Somehow, SP4 and his men who came to his assistance managed to put the man under control. SP4 then made an inspection on the red bag which carried a brand name 'Converse' and found inside the said bag a newspaper package containing two
D packages of compacted dried material suspected to be ganja. From the side pocket of the said bag SP4 also found a work pass belonging to the man. Following the recovery of the material the man was taken back to the police station for further investigation. The arrestee was the appellant in this appeal.

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[3] The chemist Puan Norashidah bt Omar (SP2) who conducted the test on the two packages of compacted dry material found them to be cannabis with a total net weight of 1,989 grammes.

F **[4]** In coming to the conclusion that appellant was in possession of the said drug, the learned judge in his judgment stated:

> Adalah tidak dapat dipertikaikan bahawa OKT sememangnya mempunyai jagaan ke atas beg merah (eks. P15) yang mengandungi dadah berbahaya tersebut (eks. P7 dan eks. P9). Beg merah
G tersebut (Eks. P15) disandang di bahu kanan OKT. Oleh itu jelas bahawa beliau mempunyai penguasaan terhadap eks. P15 pada semua waktu yang material.

[5] The learned trial judge in his judgment further added that:

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> ... tidak timbul apa-apa keraguan berdasarkan keadaan yang wujud dalam kes ini bahawa OKT mempunyai milikan fizikal terhadap dadah berbahaya (eks. P7 dan eks. P9) yang terkandung dalam beg merah (eks. P15) yang disandang di bahu kanannya. OKT mempunyai kuasa untuk berurusan dengannya sebagai seorang pemilik sehingga mengenepikan orang lain dan jika terdapat keadaan
I yang memerlukan, dia adalah berniat untuk berbuat demikian.

[6] Apparently, learned counsel for the appellant was not happy with the above rationale of the trial judge in coming to the conclusion that there was a positive possession of the drug in question by the appellant. One of the issues raised before us in this appeal is whether the trial judge was correct in finding a *prima facie* case of *mens rea* possession against the appellant. It was submitted that the trial judge had fallen into error when he interchangeably used the words "jagaan", "penguasaan" and "milikan" in coming to a finding of actual possession. It was submitted, following the decision of *Public Prosecutor v. Abdul Rahman Akif* [2007] 4 CLJ 337, a mere custody and control is not sufficient to establish possession for the purpose of the Act.

[7] With respect, we disagree with learned counsel. What was said by the learned trial judge in the passage of his judgment must be understood in the context of the facts of the case. The appellant was seen carrying the bag in question. Upon apprehension by the raiding party, the beg was seized from him. The offending drugs were found from inside the bag together with a work pass in his name. It is evident that the appellant was alone at the material time, seen carrying the bag containing the offending item. There was nothing to suggest that the appellant could not have been the sole owner of the bag and its contents. From these facts the issue that arose for determination by us is whether there was evidence of actual possession, and whether the trial judge had made a positive finding that there was actual possession of the drug by the appellant. We are conscious that the judge cannot invoke the presumption of possession under s. 37(d) of the Act. If the trial judge invoked s. 37(d) of the Act to establish possession even though there was evidence of actual possession then went on to invoke s. 37(da) to establish trafficking, it would be a serious misdirection. On the facts of the present case and appeal before us it is observed that the learned trial judge in his ground of decision had made specific finding of actual possession of the offending drug by the appellant. Nowhere in the trial judge's ground of judgment did it show that he was invoking presumption under s. 37(d) of the Act to arrive at a specific finding of actual possession.

[8] Coupled with the issue of actual possession was the issue of knowledge. In order to establish possession the prosecution must also establish that the appellant knew what he was carrying. In this regard, learned counsel for the appellant drew this court's attention to a passage from the trial judge's judgment that reads:

A Tindakan OKT meronta-ronta dan cuba melarikan diri pada pandangan Mahkamah, adalah kerana beliau mempunyai pengetahuan mengenai eks. P15 dan kerana ketakutan akibat ditangkap bersama dengan dadah berbahaya. OKT tidak mempunyai sebarang sebab untuk meronta-ronta dan melarikan diri Jika beliau tidak menyedari kewujudan atau tidak mengetahui eks. P15 mengandungi dadah berbahaya.

[9] It was submitted for the appellant that the learned trial judge by drawing an inference of knowledge on the part of the appellant had once again fallen into error as such inference was against the weight of express evidence advanced in the case for the prosecution. In response to this contention of error committed by the trial judge, learned DPP for the respondent drew this court's attention to the most recent authority, ie, case law on this subject. In *Parlan bin Dadeh v. Public Prosecutor* [2009] 1 CLJ 717, the Federal Court in its decision *inter alia*, had these to say:

1) Proof of knowledge is very often a matter of inference which varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge ...

2) The reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under s. 8 of the Evidence Act, 1950, since it has direct bearing on the facts in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by the appellant himself as required by s. 9 of the Act.

However, as the appellant did not offer any explanation for his reaction upon being approached by the police, it could be validly used as evidence against him. In the circumstances, the inference to be drawn from the evidence was that he knew what he was carrying.

[10] In *Public Prosecutor v. Mohd. Radzi Abu Bakar* [2006] 1 CLJ 457, the Federal Court held that to establish "possession" under s. 37(da) the prosecution must prove that:

The possessor must be aware of his possession, must know the nature of the things possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*.

[11] From the judgment of the trial judge, it is clear that he held the appellant to have *mens rea* possession. It is clear from the grounds that such finding was arrived at based on the factual matrix of the case as portrayed by the evidence advanced by the prosecution. Having arrived at this finding, the learned trial judge then proceeded to draw a presumption of trafficking under s. 37(da) of the Act, and this called upon the appellant to enter his defence. We find no flaw in this.

[12] In stating his defence the appellant gave his evidence on oath and the trial judge in his grounds of judgment has summarised it as follows:

> 8.1. Pada 10.3.2006, jam 2.30 petang, OKT berada di pejabatnya di Bandar Baru Uda. Menurut OKT, beliau bekerja sebagai kerani operasi di syarikat pengangkutan perkapalan. Beliau pergi ke pejabat selepas balik dari solat Jumaat apabila mendapat panggilan telefon daripada ayahnya, Osman bin Hassan (SD2) yang menyatakan bahawa borang kastam untuk import telah siap. Semasa mendapat panggilan, OKT berada di rumahnya di Permas Jaya;
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> 8.2. Menurut OKT, beliau pergi ke pejabat dari rumah dengan menaiki motosikal jenis EX5 No. JHX 8573 miliknya. Sesampai di pejabat, beliau telah meletakkan motosikal di hadapan pejabat iaitu di Kedai Serbaneka 'One Mart 24 Jam' OKT kemudiannya masuk ke pejabat pada jam 2.30 petang. Pada masa itu, beliau ada membawa sebuah beg yang berisi dokumen-dokumen kerja dan pas kerja. Apabila masuk ke pejabat, beg, helmet, jaket dan kunci motosikal, beliau tinggalkan di motosikal yang diletakkan di hadapan Kedai Serbaneka 'One Mart 24 Jam'. OKT naik ke pejabat dan turun semula pada jam 4 petang selepas dokumen-dokumen siap lebih kurang 4 petang.
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> 8.3. Apabila turun semula ke bawah, OKT telah meletakkan dokumen-dokumen itu di dalam raga motosikal dan kemudiannya pergi berjumpa seorang yang bernama 'Kassim' dan 'Kassim' memberitahunya bahawa bos Pelabuhan Tanjung Pelepas (PTP) tidak boleh datang pada hari itu untuk berjumpa OKT;
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> 8.4. Menurut OKT, beliau mengenali 'Kassim' dalam tempoh 2 bulan sebelum hari kejadian. Perjumpaan pada hari kejadian itu berlaku sekejap sahaja iaitu lebih kurang 2 minit dan selepas itu, 'Kassim' terus berlalu dari situ. OKT melihat 'Kassim'

A beredar dengan menaiki sebuah kereta jenis Kancil di mana no. pendaftaran kereta tidak dapat diingat tetapi kereta itu berwana coklat;

8.5. Menurut OKT, beg merah itu berada di dalam raga motosikal dan beliau meletakkan dokumen-dokumen tersebut di dalam
B raga. Selepas berbincang dengan 'Kassim', OKT mengambil/ galas beg dan memakai jaket. Ketika itulah OKT dikatakan diserbu dan ditangkap;

8.6. OKT tidak ingat berapa ramaikah anggota polis yang membuat serbuan. Serbuan dibuat dari arah belakang dan mereka tidak
C beruniform. Pada masa itu, OKT memikirkan bahawa mereka ingin menyamunnya kerana mereka tidak memberitahu identiti mereka. OKT terperanjat. OKT meronta-ronta kerana sakit tertiarap di atas jalan;

D **[13]** With the above line of defence in the background, it was submitted for the appellant that the trial judge ought to have considered the shortcomings of the investigations on this case in that no investigations were actually conducted and carried out to determine the existence of 'Kassim', the person alleged to be the
E actual trafficker in this case. Connected to this issue was an assertion by the defence that there was an arrest made in Kulai at about the same time in connection with the present case. It was submitted for the appellant that information about this arrest was suppressed by the prosecution's witness SP4. For this reason it was
F further submitted that SP4 was not a credible witness and his evidence should therefore be disregarded.

[14] The question obviously arose from the above averment ie, the existence of 'Kassim' would be whether such person really existed
G or could it be a mere figment of the appellant's imagination invented for the purpose of the trial. The trial judge in discerning this crucial issue in his judgment had this to say:

Intipati pembelaan OKT ialah beliau telah diperangkap atau dianiaya, bukan oleh polis, tetapi oleh seorang yang bernama
H 'Kassim'. Walaupun OKT tidak secara nyata mendakwa 'Kassim' telah meletakkan eks. P7 dan eks. P9 di dalam beg merah (eks. P15) yang dikatakan ditinggalkan di dalam raga motosikal tetapi secara implikasi OKT membayangkan bahawa 'Kassim' mempunyai masa dan peluang untuk berbuat sedemikian.

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OKT juga menafikan keterangan SP4 yang beliau ditangkap semasa sedang berjalan menuju ke arah depan Kedai Serbaneka 'One Mart 24 Jam' tetapi sebaliknya menyatakan bahawa beliau ditangkap selepas turun dari pejabatnya dan menuju ke tempat di mana motosikalnya diletakkan. OKT menyatakan beliau tidak mengetahui kewujudan dadah berbahaya yang terdapat di dalam beg merah (eks. P15) dan menafikan bahawa beliau ada meronta-ronta dan cuba melarikan diri semasa ditangkap.

Berdasarkan pembelaan yang dikemukakan adalah menjadi tugas Mahkamah ini untuk menentukan, pertama sama ada 'Kassim' ialah orang sebenar ("a real person") atau hanya rekaan OKT semata-mata bagi tujuan pembelaan dan kedua, jika Mahkamah memutuskan bahawa 'Kassim' ialah orang sebenar, adakah dia merupakan pengedar yang sebenar, Panduan ini telah diberikan oleh Gopal Sri Ram HMR dalam kes *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 apabila beliau berkata:

> That case (*Mohamad Radhi v. PP* [1991] 3 CLJ is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker.

[15] Guided by the above, what is called "Radhi direction" the trial judge apparently came to a finding that 'Kassim' was a fictitious person, and gave his reasons for such finding as follows:

20.1. OKT mengatakan apabila dia turun ke bawah dari pejabatnya, beliau meletakkan dokumen-dokumen di dalam raga motosikal. Beg merah (eks. P15) yang kemudiannya didapati mengandungi dadah berbahaya (eks. P7 dan eks. P9) dan jaket juga telah ditinggalkan di dalam raga motosikal sebelum ini. Kemudiannya dia pergi berjumpa/berbincang dengan 'Kassim' dengan memakai jaket dan menggalas beg tersebut. Pada ketika itulah OKT dikatakan diserbu dan ditangkap oleh polis. Versi ini bertentangan dengan versi saksi-saksi pendakwaan. SP4 menyatakan OKT ditangkap semasa dia sedang berjalan menuju ke arah hadapan Kedai Serbaneka 'One Mart 24 Jam' dengan menggalas beg merah tersebut.

A Perlu diambil perhatian bahawa mengikut SP4, beliau bersama-sama dengan L/Kpl. Siti Johara sedang membuat pemerhatian – dari kedai bunga berhampiran dengan Kedai Serbaneka 'One Mart 24 Jam' itu. Manakala Kumpulan II pula, yang antara lain dianggotai oleh SP6 (D/Kpl. Rajuddin bin Mohamed), berada di dalam kereta berhadapan dengan kedai bunga bersebelahan Kedai Serbaneka 'One Mart 24 Jam' itu. Tumpuan mereka ialah ke arah tempat letak kereta. Sekiranya benar versi OKT yang dia turun dari pejabatnya yang terletak di atas Kedai Serbaneka 'One Mart 24 Jam', bagaimana SP4 dan SP6 boleh melihat OKT datang dari arah bertentangan dan pergi ke motosikal untuk meletakkan dokumen-dokumen yang dibawanya di dalam raga, mengambil jaket dan beg merah dari dalam raga motosikal dan seterusnya pergi berjumpa/berbincang dengan 'Kassim'. Saksi-saksi pendakwaan mengatakan tidak ada motosikal di tempat kejadian seperti yang dikatakan oleh OKT. Jika sebenarnya motosikal itu ada di tempat kejadian, mengapakah motosikal tersebut tidak dirampas oleh anggota-anggota polis yang membuat serbuan seperti yang biasa dilakukan memandangkan ia adalah suatu barang kes yang penting. Borang Geledah ("search list") iaitu eks. P17 juga tidak menyenaraikan motosikal sebagai salah satu item yang dirampas. Pegawai Penyiasat (SP5) dalam keterangannya mengakui bahawa dalam siasatan yang dijalankan, OKT ada memberitahunya mengenai sebuah motosikal no, daftar JHX 8573. Walau bagaimanapun, apabila SP5 membuat pertanyaan kepada semua anggota serbuan, mereka tidak tahu menahu mengenainya.

20.2. ...

20.3. Cerita OKT bahawa 'Kassim' adalah pengedar sebenar dan telah menganiaya beliau dengan meletakkan dadah berbahaya di dalam beg (eks. P15) tanpa pengetahuan beliau adalah tidak meyakinkan. OKT mengatakan bahawa tujuan 'Kassim' berada di tempat kejadian adalah semata-mata untuk memaklumkan kepadanya bahawa bos di PTP tidak dapat berjumpa OKT pada petang tersebut. OKT mengakui dia ada berhubung dengan 'Kassim' melalui telefon mengenai urusan kerja. Persoalan yang berbangkit ialah mengapakah 'Kassim' tidak memaklumkan perkara itu kepada OKT melalui telefon tanpa perlu pergi berjumpa/berbincang dengan OKT. Perjumpaan itu pula berlaku sekejap sahaja, iaitu selama 2 minit sahaja;

20.4. Sekiranya 'Kassim' adalah pengedar sebenar iaitu orang yang telah meletakkan dadah berbahaya ke dalam beg merah OKT tanpa pengetahuannya, adalah tidak munasabah untuk 'Kassim' menunggu sehingga OKT turun dari pejabatnya untuk memberitahu tentang bos di PTP tidak boleh datang, sedangkan 'Kassim' boleh dengan segera menghilangkan diri dari tempat itu selepas meletakkan dadah berbahaya di dalam beg itu. Dengan demikian, 'Kassim' tidak boleh dikaitkan dengan dadah berbahaya tersebut. Keterangan SD2, iaitu bapa OKT yang melihat kereta Kancil dan 'Kassim' di tempat kejadian hanya bertujuan menyokong keterangan OKT yang didengarinya sebelum itu. Ia juga tidak meyakinkan;

[16] With regard to the event of arrest of another person in Kulai alleged to be connected with the present case and which fact learned counsel alleged to have been suppressed by SP4, the trial judge did not accede to the proposition and request of the defence counsel that the said witness was not a credible witness and his testimony should therefore be disregarded. He gave his reasons as follows:

> Mahkamah telah melihat 'demeanour' beliau semasa memberi keterangan tentang apa yang berlaku pada hari kejadian. Beliau ialah seorang pegawai kanan polis. SP4 tidak mendedahkan tentang tangkapan di Kulai kerana mengikut nota perbicaraan, soalan-soalan berkenaan tangkapan itu tidak dikemukakan kepada beliau pada pemeriksaan awal. Apabila soalan-soalan dikemukakan semasa soal balas oleh peguam terpelajar, SP4 tidak menyembunyikan apa-apa fakta tersebut. Bagi SP4, tangkapan di Kulai itu adalah merupakan satu kes berasingan yang disiasat oleh pegawai penyiasat berlainan ... Mahkamah tidak dapat mengesan apa-apa "evil motive" di pihak SP4 dan keterangannya adalah "probable" berdasarkan kepada keterangan-keterangan yang dikemukakan dalam kes ini.

[17] The trial judge in coming to the above conclusion derived support from the decision of Thomson CJ in *PP v. Muhamed Ali* [1962] 1 LNS 129. In that case the learned Chief Justice said:

> When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

A **[18]** It is thus clear that the trial judge based on combined effect of all the surrounding circumstances had made a finding of facts that the appellant had *mens rea* possession and that the case came within s. 37(da) of the Act, so that the appellant was presumed to be a trafficker of the drug in question. On minute analysis of the
B appellant's defence the trial judge concluded that the appellant had failed to rebut the presumption raised as aforesaid. We find no reasons to disagree with the aforesaid conclusion.

[19] To keep within the limit of our function as the appellate
C court we decline to interfere with the findings of facts arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. In short, the appellant was rightly convicted.

D **[20]** For the above reasons we dismiss the appeal and uphold the conviction and also affirm the sentence.

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